

JUN 22 2016



SAN FRANCISCO

BAYKEEPER®

June 16, 2016

Citizen Suit Coordinator
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Law and Policy Section
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Gina McCarthy, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue NW
Washington, DC 20460

Sent via Certified Mail and Electronic Mail

Re: Consent Decree – *San Francisco Baykeeper v. City of San Jose, et al.* (Civil Case No. 15-CV-00642-BLF)

Dear Citizen Suit Coordinator and Administrator McCarthy:

Please find enclosed a copy of a [Proposed] Consent Decree between San Francisco Baykeeper ("Baykeeper") and the City of San Jose, resolving Baykeeper's claims against the City and its Departments of Transportation, Public Works, and Environmental Services, for Clean Water Act violations (*San Francisco Baykeeper v. City of San Jose, et al.*, Civil Case No. 15-cv-00642-BLF). The [Proposed] Consent Decree requires the City to reduce discharges of trash and bacteria from the San Jose municipal separate storm sewers system and to repair and replace degraded pipes in the City's sanitary sewer collection system.

If you have any questions or comments concerning the terms of the Consent Decree, please contact me at (510) 735-9700 x106 or erica@baykeeper.org, or Daniel Cooper, Lawyers for Clean Water, at (415) 440-6520 x204 or daniel@lawyersforcleanwater.com.

Sincerely,

Erica A. Maharg
Staff Attorney
San Francisco Baykeeper

Enclosure



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Cc via Electronic Mail:

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18 Attorneys for Plaintiff
19 SAN FRANCISCO BAYKEEPER

20 UNITED STATES DISTRICT COURT
21 NORTHERN DISTRICT OF CALIFORNIA

22 SAN FRANCISCO BAYKEEPER, a California
23 non-profit corporation,

24 Plaintiff,

25 v.

26 CITY OF SAN JOSÉ, a municipality, et al.,

27 Defendants.
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Civil Case No.: 15-CV-00642-BLF

[PROPOSED] CONSENT DECREE

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WHEREAS, Baykeeper is a 501(c)(3) non-profit public benefit corporation dedicated to, among other things, the protection and enhancement of the water quality of the San Francisco Bay;

WHEREAS, the City of San José is an owner and operator of a Municipal Separate Storm Sewer System that serves the City of San José ("San José MS4");

WHEREAS, the City of San José is an owner and operator of a separate sewage collection system that serves the City of San José that is not a part of the San José MS4 ("San José Collection System");

WHEREAS, the San José MS4 is regulated by the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("Clean Water Act" or "CWA"), and is permitted under *Municipal Regional Stormwater NPDES Permit*, NPDES Permit No. CAS612008, Order No. R2-2015-0049, California Regional Water Quality Control Board, San Francisco Bay Region ("MS4 Permit," "MRP," or "Permit");

WHEREAS, the approach to demonstrating compliance with trash reduction requirements is outlined in the MRP;

WHEREAS, on November 24, 2014, Baykeeper issued a sixty (60) day notice letter ("Notice Letter") to Defendant. The Notice Letter informed Defendant of Baykeeper's intent to file suit against it for alleged Clean Water Act violations of the MS4 Permit, including alleged unlawful discharges of pollutants from the San José MS4 and alleged sewage discharges to the San José MS4 from the San José Collection System;

1 **WHEREAS**, on February 11, 2015, Baykeeper filed its complaint against San
2 José in the United States District Court for the Northern District of California, Civil Case
3 No. 15-CV-00642-BLF (hereinafter, "Complaint");

4 **WHEREAS**, Defendant denies Baykeeper's allegations in the Complaint;

5 **WHEREAS**, the Parties, through their authorized representatives and without
6 either adjudication of the Complaint's claims or admission by San José of any alleged
7 violation or other wrongdoing, have chosen to resolve this action through settlement to
8 avoid the costs and uncertainties of further litigation;

9 **WHEREAS**, the Parties intend for this Consent Decree be consistent with
10 regulatory requirements; and

11 **WHEREAS**, all actions taken by San José pursuant to this Consent Decree will be
12 made in compliance with all applicable federal, state and local rules and regulations.

13 **NOW THEREFORE IT IS HEREBY STIPULATED BETWEEN THE PARTIES**
14 **AND ADJUDGED, ORDERED, AND DECREED BY THE COURT AS FOLLOWS:**

15 1. The Court has jurisdiction over the subject matter of this Action pursuant to
16 Section 505(a)(1)(A) of the Clean Water Act, 33 U.S.C. § 1365(a)(1)(A).

17 2. Venue is appropriate in the Northern District pursuant to Section 505(c)(1)
18 of the Clean Water Act, 33 U.S.C. § 1365(c)(1).

19 3. The Complaint states claims upon which relief may be granted pursuant to
20 Section 505 of the Clean Water Act, 33 U.S.C. § 1365.

21 4. Plaintiff has standing to bring this action.

22 5. The Court will retain jurisdiction over this matter for purposes of enforcing
23 the terms of this Consent Decree for the life of the Consent Decree, or as long thereafter
24 as is necessary for the Court to resolve any motion to enforce this Consent Decree.

25 **I. DEFINITIONS**

26 6. Unless otherwise expressly defined herein, terms used in this Consent
27 Decree that are defined in the Clean Water Act or in regulations, or in rules promulgated
28 under the Clean Water Act, have the meaning assigned to them in the applicable

1 statutes, regulations, or rules. Whenever terms listed below are used in this Consent
2 Decree, the following definitions apply:

3 a. "Annual Report" means a consolidated report containing reporting
4 obligations in the MRP and this Consent Decree and will be submitted to Baykeeper on
5 or before October 30th of any Year this Consent Decree is in effect.

6 b. "CCTV" means closed-circuit television.

7 c. "Consent Decree" means this Consent Decree, and any exhibits and
8 appendices incorporated by reference to this Consent Decree.

9 d. "Critical Bacteria Storm" means the 90th percentile 24-hour wet
10 weather day when bacteria receiving water limits apply. For San José, the Critical
11 Bacteria Storm equates to a 24-hour storm event of 0.46 inches.

12 e. "Day" means a calendar day. In computing any period of time under
13 this Consent Decree, where the last day of such period is a Saturday, Sunday, or
14 Federal, State, or City Holiday, the period runs until the close of business on the next
15 day that is not a Saturday, Sunday, or Federal, State, or City Holiday.

16 f. "Dry Season" means the season from May 1 to September 30 of the
17 same calendar Year.

18 g. "FIB" means Fecal Indicator Bacteria.

19 h. "Full Trash Capture System" means any single device or series of
20 devices that traps all particles retained by a five millimeter mesh screen and has a
21 design treatment capacity of not less than the peak flow rate resulting from a one-Year,
22 one-hour storm in the sub-drainage area, which also includes a trash reservoir large
23 enough to contain a reasonable amount of trash safely without overflowing trash into the
24 overflow outlet between maintenance events.

25 i. "Gravity Sewer" means pipes within San José's Collection System
26 that convey wastewater by gravity flow.

27 j. "Infeasible" means cannot be accomplished due to soil type,
28 groundwater contamination, physical limitations, or engineering impossibility. Infeasible

1 shall not mean lack of funding.

2 k. "Low Impact Development" means a Treatment Control that uses or
3 mimics natural processes that result in the infiltration, evapotranspiration, biotreatment or
4 use of stormwater in order to protect water quality and associated habitat.

5 l. "MS4" means "a conveyance or system of conveyances (including
6 roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches,
7 man-made channels, or storm drains)" owned or operated by a State, city, or town that is
8 "designed or used for collecting or conveying storm water" and "that discharges to waters
9 of the United States." See 40 C.F.R. § 122.26(b)(8); see also *id.* § 122.26(b)(18).

10 m. "Multi-Benefit Project" means a Treatment Control project designed
11 to achieve any of the benefits set forth in section 10562, subdivision (d) of the Water
12 Code. Examples include projects designed to infiltrate, recharge, biotreat, or store
13 Stormwater; develop or enhance habitat and open space through Stormwater and non-
14 Stormwater management; and/or reduce Stormwater and non-Stormwater runoff volume.

15 n. "San José Collection System" is comprised of the City of San José's
16 sanitary sewer collection system, including the sewer pipes and lines, manholes or
17 maintenance holes, and all appurtenances thereto owned by San José that are used to
18 convey wastewater generated by residential, commercial, and industrial sources to the
19 Water Pollution Control Plant.

20 o. "Sanitary Sewer Overflow" or "SSO" means any overflow, spill,
21 release, discharge, or diversion of untreated or partially treated wastewater from the San
22 José Collection System. SSOs include: (1) overflows or releases of untreated or
23 partially treated wastewater that reach waters of the United States; (2) overflows or
24 releases of untreated or partially treated wastewater that do not reach waters of the
25 United States; and (3) wastewater backups into buildings and on private property that
26 are caused by blockages or flow conditions within the publicly owned portion of the San
27 José Collection System.

28 p. "Sewer Line Segment" means any section of publicly owned sewer

1 line or pipe located between: (1) two manholes/maintenance holes; (2) a pump station
2 and a manhole/maintenance hole; (3) a pump station or a manhole/maintenance hole
3 and a headworks structure; or (4) a sewer line or pipe otherwise identifiable as a discrete
4 section.

5 q. "Stormwater" has the meaning set forth in 40 C.F.R. §
6 122.26(b)(13).

7 r. "Trash" consists of litter and particles of litter. Litter means all
8 improperly discarded waste material, including, but not limited to, convenience food,
9 beverage, and other product packages or containers constructed of steel, aluminum,
10 glass, paper, plastic, and other natural and synthetic materials, thrown or deposited on
11 the lands and waters of the State, but not including the properly discarded waste of the
12 primary processing of agriculture, mining, logging, sawmilling, or manufacturing.

13 s. "Trash Hot Spots" means locations of high trash density along
14 receiving water bodies, selected pursuant to Provision C.10.c of the MS4 Permit.

15 t. "Treatment Controls" means best management practices to either:
16 (1) remove or biotreat pollutants and/or solids from Stormwater runoff, wastewater, or
17 effluent; or (2) capture, infiltrate, reuse, or biotreat Stormwater runoff, wastewater, or
18 effluent. Treatment Controls include Full Trash Capture Systems, Low Impact
19 Development Controls and Multi-Benefit Projects.

20 u. "Very High, High, or Moderate Trash Generation Areas" are areas
21 that are considered to generate more than five (5) gallons of trash per acre per Year and
22 has the meaning set forth in the MS4 Permit.

23 v. "Waters of the United States" has the meaning as set forth in 40
24 C.F.R. § 122.2 and as interpreted in applicable case law.

25 w. "Wet Weather" means a time period within 48 hours after a storm
26 event in excess of 0.2 inches in depth.

27 x. "Year" means calendar year, unless otherwise specified.
28

1 **II. EFFECT OF CONSENT DECREE**

2 7. Notwithstanding the general objectives of this Consent Decree, Baykeeper
3 does not, by its consent to this Consent Decree, warrant or aver in any manner that San
4 José's compliance with this Consent Decree will constitute or result in compliance with
5 any federal, state, or local law or regulation. This Consent Decree is neither a permit nor
6 a modification of existing permits under any federal, state, or local law and in no way
7 relieves San José of its responsibilities to comply with all applicable federal, state, and
8 local laws and regulations.

9 8. The Parties enter into this Consent Decree for the purpose of avoiding
10 costly litigation. Nothing in this Consent Decree will be construed as an admission by
11 San José, and San José does not intend to imply any admission as to any fact, finding,
12 issue of law, or violation of law, nor will compliance with this Consent Decree be
13 construed as an admission by San José of any fact, finding, conclusion, issue of law, or
14 violation of law.

15 **III. APPLICABILITY**

16 9. The provisions of this Consent Decree apply to and bind the Parties,
17 including any successors or assigns. The Parties certify that their undersigned
18 representatives are fully authorized to enter into this Consent Decree, to execute it on
19 behalf of the Parties, and to legally bind the Parties to its terms.

20 10. The Parties agree to be bound by this Consent Decree and not to contest
21 its validity in any subsequent proceeding to implement or enforce its terms.

22 11. No change in ownership or corporate or other legal status of San José or
23 any transfer of San José's assets or liabilities will in any way alter the responsibilities of
24 San José, or any of its successors or assigns, under this Consent Decree.

25 12. In any action to enforce this Consent Decree, San José will not raise as a
26 defense the failure by any of its agents, servants, contractors, employees, and
27 successors or assigns to take actions necessary to comply with this Consent Decree.
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1 **IV. AGENCY REVIEW, EFFECTIVE DATE AND TERMINATION DATE**

2 13. The Effective Date of this Consent Decree will be the date that the Court
3 enters the final Consent Decree.

4 14. Plaintiff shall: (a) submit this Consent Decree by certified mail to the
5 United States Department of Justice and the Environmental Protection Agency
6 (collectively, "Federal Agencies") within three (3) business days of the Parties' execution
7 of this Consent Decree for agency review consistent with 40 C.F.R. § 135.5; and (b)
8 lodge this (proposed) Consent Decree with the District Court. In the event the Federal
9 Agencies comment negatively on the provisions of this Consent Decree, the Parties
10 agree to meet and confer to resolve the issues raised by the Federal Agencies. After the
11 Federal Agencies have either completed their review of this Consent Decree without
12 objection or the 45-day agency review period has expired, whichever is earlier, Plaintiff
13 shall promptly request that the District Court enter this Consent Decree, and within five
14 (5) days of entry of the Consent Decree, move to dismiss the Complaint and all claims
15 therein with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

16 15. This Consent Decree will terminate ten (10) Years from the Effective Date
17 ("Termination Date").

18 **V. TRASH REDUCTION PROGRAM**

19 **A. Trash Reduction Requirements**

20 16. San José shall reduce trash discharges from 2009 levels to receiving
21 waters in accordance with the following schedule:

22 a. 70% by July 1, 2017; and

23 b. 80% by July 1, 2019.

24 **B. Compliance with the MS4 Permit**

25 17. San José is required to comply with the requirements of Section C.10 of
26 the MS4 Permit.

27 18. If San José revises its Long-Term Trash Reduction Plan at any time during
28 the term of this Consent Decree, San José will provide the revised Long-Term Trash

1 Reduction Plan to Baykeeper no later than thirty (30) days after submission of the
2 revision.

3 **C. Receiving Water Monitoring Program**

4 19. San José shall develop and implement a receiving water monitoring
5 program designed to answer the following questions:

6 a. Have trash control actions effectively prevented trash within San
7 José's jurisdiction from discharging into receiving water(s)?

8 b. Is trash present in receiving water(s), including transport from one
9 receiving water to another, e.g., from a creek to a San Francisco Bay segment, at levels
10 that may cause adverse water quality impacts?

11 c. What proportions of trash found in these receiving waters are from
12 MS4 pathways and non-MS4 pathways?

13 d. What is the characterization of trash types in these receiving
14 waters?

15 e. Has the amount of trash discharged from the San José MS4
16 decreased from the previous year and over time? If so, by how much? If not, why?

17 f. Has the amount of trash at the Trash Hot Spots decreased from the
18 previous year?

19 20. The receiving water monitoring program shall include direct measurements
20 or observations of trash in receiving water(s), or in scenarios where direct measurements
21 or observations are not feasible, surrogates for trash in receiving water(s), such as
22 measurement of trash on stream banks or shorelines.

23 21. San José will develop the Receiving Water Monitoring Program which
24 includes criteria for designating which types of trash are associated with non-MS4
25 pathways, including criteria based on: (a) trash size (i.e., too large for discharge through
26 an MS4 system), (b) location (i.e., proximity to homeless encampment or illegal dumping
27 site), and (c) type of material. San José shall provide the Receiving Water Monitoring
28 Program to Baykeeper for comment within sixty (60) days of the Effective Date.

Baykeeper will submit comments, if any, on the Receiving Water Monitoring Program within thirty (30) days of receipt. San José will consider Baykeeper's comments in good faith within thirty (30) days of receipt, and will either incorporate those comments into the criteria or explain in writing why those comments were not accepted. Disputes as to the adequacy of the Receiving Water Monitoring Program shall be resolved through the Dispute Resolution provisions in Section XII below.

22. Receiving water monitoring will be conducted once annually during the Dry Season at the six (6) Trash Hot Spots identified in Table 1. Receiving water monitoring shall begin during the 2017 Dry Season.

Table 1. Receiving Water Monitoring Locations at Designated Trash Hot Spots

Trash Hot Spot
1) SJC02 Coyote Creek at 101 (Watson Park)
2) SJC08 Coyote Creek at Roosevelt Park
3) SJC25a Coyote Creek at Singleton Rd.
4) SJC23 Confluence of Guadalupe River at W. Santa Clara St.
5) SJC27 Guadalupe River upstream of Woz Way to Interstate 280
6) SJC31 Guadalupe River at Alma

23. San José shall collect and record the following data for each monitoring event:

- a. Tons and estimated volume of trash removed;
- b. Types of trash removed (trash characterization); and
- c. Estimated proportion of trash from MS4 and non-MS4 sources.

24. San José shall sort and characterize trash removed from each of the seven (7) monitoring sites. Information will be collected using the most current Santa Clara Valley Urban Runoff Pollution Prevention Program ("SCVURPPP") "Trash Hot Spot Cleanup Data Collection Form."

25. Based on this monitoring data, San José shall annually conduct an analysis to answer the questions set out in Paragraph 19 above. This analysis will be included in the Annual Report.

26. San José shall retain documentation of the Receiving Water Monitoring Program, including the trash condition before and after the cleanup of the entire Trash

1 Hot Spot using photo documentation with a minimum of one (1) photo per hundred feet
2 of Trash Hot Spot length. Photo documentation will be completed in accordance with the
3 most current SCVURPPP "Photograph Documentation Protocol for Creek and Shoreline
4 Trash Hot Spots" protocol.

5 **D. Full Capture Systems**

6 27. San José shall, in addition to the 1,328 acres currently in place, install and
7 maintain Full Trash Capture Systems sufficient to treat runoff from 3,000 acres of Very
8 High, High, or Moderate Trash Generation Areas. The Full Trash Capture Systems shall
9 be fully installed and operational by October 1, 2017.

10 28. San José will maintain the Full Trash Capture Systems in accordance with
11 Section C.10.b.i of the MS4 Permit. If San José reduces the frequency of inspections,
12 San José shall report such reduction in that Year's Annual Report and provide
13 supporting documentation to Baykeeper. Disputes shall be resolved through the Dispute
14 Resolution provisions in Section XII below.

15 29. Maintenance shall include visual inspection and removal of all accumulated
16 trash when the device is plugged or is greater than fifty (50) percent full of accumulated
17 trash. If a Full Trash Capture System requires removal of accumulated trash, San José
18 will inspect the device again within thirty (30) days after the accumulated trash was
19 removed. If the device is plugged or is greater than fifty (50) percent full of accumulated
20 trash at that time, San José will remove the accumulated trash from Full Trash Capture
21 System again and develop a device-specific inspection and maintenance plan to ensure
22 the device is neither plugged nor more than half full of trash at the next maintenance
23 event.

23 **E. Trash Hot Spots**

24 30. San José will clean Trash Hot Spots to a level of "no visual impact" at least
25 one time per Year. This entails removal of all trash, debris, and historic derelict material
26 (e.g., tires, barrels and shopping carts) in excess of two (2) inches in diameter. Trash
27 Hot Spots must be at least 100 yards of creek length or 200 yards of shoreline length.
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1 San José agrees to maintain a total number of thirty-two (32) Trash Hot Spots.

2 31. With the exception of the following modifications, San José will maintain
3 the existing Trash Hot Spots, as identified by the SCVURPPP in Trash Hot Spot
4 Selection: Final Report, submitted to the California Regional Water Quality Control
5 Board, San Francisco Bay Region ("Regional Water Board") on June 29, 2010, and:

- 6 a. Discontinue SJC01, SJC17, and SJC20;
- 7 b. Add Coyote Creek at Berryessa Road;
- 8 c. Add Coyote Creek downstream of East Capital Expressway;
- 9 d. Add Coyote Creek at Story and Senter Road.

10 32. San José will modify the existing Trash Hot Spots to include the Trash Hot
11 Spots identified in Paragraph 31 within ninety (90) days of the Effective Date of this
12 Consent Decree.

13 33. San José will annually assess Trash Hot Spot locations and may select
14 new Trash Hot Spot locations if, based on cleaning and reporting as required in this
15 Section, existing Trash Hot Spot locations are no longer Trash Hot Spots or if other
16 locations may better align with trash management areas. San José will consult with
17 Baykeeper on sites proposed for addition to or removal from the Trash Hot Spot list.

18 **F. Trash Program Reporting and Action Plan**

19 34. San José shall provide the information required by the MS4 Permit,
20 sections C.10.b.i.b, C.10.c.iii, and C.10.f, to Baykeeper as part of its Annual Report
21 pursuant to this Consent Decree, except that each Annual Report shall include an
22 updated trash generation area map or maps, which include trash management areas,
23 including the locations and associated drainage areas of full trash capture systems and
24 other trash control actions, and the locations of Trash Hot Spots, with highlights or other
25 indication of any revisions or changes from the previous year map(s).

26 35. In the event that San José is obligated to prepare a Trash Action Plan
27 under Section C.10.f.v of the MS4 Permit, San José will provide a copy of the Trash
28 Action Plan to Baykeeper prior to submission. Baykeeper will review the Trash Action

1 Plan and must submit comments, if any, on the Trash Action Plan within fifteen (15) days
2 of receipt. San José will consider Baykeeper's comments in good faith within thirty (30)
3 days from receipt of Baykeeper's comments. San José will either incorporate those
4 comments into the Trash Action Plan or explain in writing why those comments were not
5 accepted. Disputes as to the adequacy of a Trash Action Plan shall be resolved through
6 the Dispute Resolution provisions in Section XII below.

7 36. For any trash control action that involves public education, including trash
8 reduction marketing campaigns, San José will employ its best efforts to positively credit
9 the partnership between Baykeeper and San José and offer Baykeeper the opportunity
10 to co-brand any media and marketing materials, if appropriate.

11 VI. FECAL INDICATOR BACTERIA ASSESSMENT PROGRAM

12 37. Within 120 days of the Effective Date, San José shall develop and submit
13 to Baykeeper a monitoring plan to characterize Wet Weather concentrations and source
14 types of fecal indicator bacteria ("FIB") from designated sites ("FIB Monitoring Plan").
15 Data produced pursuant to the FIB Monitoring Plan shall not be utilized to determine
16 compliance with FIB load reduction requirements.

17 38. The purpose of the FIB Monitoring Plan is to address the following
18 questions:

19 a. What are the wet weather in-stream FIB concentrations upstream of
20 the San José MS4?

21 b. What are the wet weather in-stream FIB concentrations within
22 reaches influenced by the San José MS4?

23 39. To address Paragraph 38.a above, the City will collect samples from
24 receiving waters during fifteen (15) wet weather events within the first five (5) Years after
25 the Effective Date from two (2) in-stream monitoring locations located immediately
26 upstream of the influence of the San José MS4: one (1) location within Coyote Creek, at
27 Metcalf Park (37.23514N, -121.76194W); and one (1) location in Los Gatos Creek at
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1 Hamilton Avenue (37.29444N, -121.93312W). Samples will be analyzed for, at a
2 minimum, E.coli and Enterococci.

3 40. To address Paragraph 38.b above, the City will collect samples from
4 receiving waters during fifteen (15) wet weather events within the first five (5) Years after
5 the Effective Date from six (6) in-stream monitoring locations located in reaches
6 influenced by the San José MS4: two (2) locations within Coyote Creek, two (2) locations
7 within the Guadalupe River, one (1) location within Los Gatos Creek, and one (1)
8 location within Penitencia Creek. Sampling locations will be identified in the FIB
9 Monitoring Plan and will be located such that they represent well-mixed areas
10 downstream of MS4 outfalls draining urban areas. Samples will be analyzed for, at a
11 minimum, E.coli and Enterococci.

12 41. The FIB Monitoring Plan shall include a section on quality assurance
13 protocols to ensure validity and quality of the data collected, in general accordance with
14 EPA Guidance for Quality Assurance Project Plans (EPA QA/G-5), December 2002,
15 EPA/240/R-02/009. This section shall also identify the laboratory or laboratories to
16 conduct the analyses and describe the methods for sample preparation and shipping.

17 42. Baykeeper will review the FIB Monitoring Plan and submit comments, if
18 any, within thirty (30) days of receipt. San José shall consider Baykeeper's comments in
19 good faith, and shall have thirty (30) days from receipt of Baykeeper's comments to
20 either incorporate those comments into the FIB Monitoring Plan or explain in writing why
21 those comments were not accepted. Disputes as to the adequacy of the FIB Monitoring
22 Plan are to be resolved via Dispute Resolution as set out in Section XII below.

23 43. All monitoring results generated for the prior Year shall be summarized,
24 with corresponding original lab results, and submitted to Baykeeper by October 30th of
25 each of the five (5) sampling years.

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1 **VII. FIB Load Reduction and Comprehensive Load Reduction Plan**

2 **A. FIB Load Reduction Standard**

3 44. The FIB load reduction standard shall be achieved through reductions in
4 flow from each sub-watershed of the San José MS4 to receiving waters, equivalent to full
5 retention of the Critical Bacteria Storm ("FIB Load Reduction Standard"). The Critical
6 Bacteria Storm shall be based upon a 22% exceedance rate. Following the methods
7 utilized in the *Enhanced Watershed Management Program for Ballona Creek Watershed*
8 and *Appendix I of the Total Maximum Daily Loads for Indicator Bacteria, Project I -*
9 *Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek):*
10 *Methodology for Calculating TMDLs for Impaired Beaches and Creeks and Allocating to*
11 *Sources*, a 22% exceedance rate correlates to a Critical Bacteria Storm of 0.46 inches,
12 based on historic precipitation data for San José (NOAA National Climatic Data Center
13 <http://www.ncdc.noaa.gov/cdo-web/precipitation> data record for the San Jose, CA station
14 GHCND: USC0047821, January 1, 1950 to September 30, 2007), which is approximately
15 equivalent to the 82nd percentile 24-hour storm.

16 **B. Reasonable Assurance Analysis and Comprehensive Load Reduction Plan**

17 45. San José shall develop and implement a Comprehensive Load Reduction
18 Plan ("CLRP") to meet the FIB Load Reduction Standard, as defined in Paragraph 44 by
19 October 1, 2050. The CLRP shall be developed in a manner consistent with the
20 *Guidelines for Conducting Reasonable Assurance Analysis in a Watershed*
21 *Management Program, Including an Enhanced Watershed Management Program*,
22 developed pursuant to the Los Angeles County MS4 Permit, Order No. R4-2012-0175
23 ("eWMP Guidance").

24 46. The CLRP shall include a Reasonable Assurance Analysis ("RAA") and
25 shall be supported by a process-based Best Management Practice ("BMP")
26 Performance Model referenced in Table 1 of the eWMP Guidance, to demonstrate that
27 implementation of prescribed structural and non-structural BMPs shall, with a
28

1 reasonable level of assurance, achieve the FIB Load Reduction Standard by October 1,
2 2050.

3 47. The CLRP shall include a Maintenance and Monitoring Plan ("MMP"), to
4 assure maintenance of BMPs and implementation of a monitoring program sufficient to
5 determine compliance with the FIB Load Reduction Standard. The monitoring program
6 shall not be required to include end of pipe monitoring.

7 48. The CLRP shall include detailed description of each regional Multi-Benefit
8 Project, consistent with Section D.I.a of the eWMP Guidance. Description of other
9 Treatment Controls deemed necessary to achieve the FIB Load Reduction Standard
10 shall be described consistent with Sections D.I.a or D.I.b of the eWMP Guidance. For
11 the purposes of modeling pollutant load and flow reductions, data on performance of
12 regional Multi-Benefit Projects and other Treatment Controls shall be drawn only from
13 peer-reviewed sources, including but not limited to sources such as the International
14 Stormwater BMP Database (available at <http://www.bmpdatabase.org/>).

15 49. The CLRP will prioritize site selection of Multi-Benefit Projects and Low
16 Impact Development installations to achieve applicable water quality-based effluent
17 limitations, waste load allocations, and receiving water limitations associated with trash,
18 polychlorinated biphenyls ("PCBs"), mercury, and other pollutants, to the extent
19 appropriate. For the purposes of RAA modeling, FIB shall serve as the "limiting
20 pollutant," pursuant to the eWMP Guidance.

21 50. The CLRP shall include a schedule and estimated budget of
22 implementation designed to achieve compliance with the schedule for implementation,
23 established in Paragraph 53 of this Consent Decree. The budget and schedule shall be
24 sufficiently robust to support a financial analysis to evaluate funding needs.

25 51. Baykeeper shall review the draft CLRP and submit comments, if any, within
26 thirty (30) days of receipt, consistent with the schedule established in Paragraph 53 of
27 this Consent Decree. San José shall consider Baykeeper's comments in good faith, and
28

1 shall have thirty (30) days from receipt of Baykeeper's comments to either incorporate
2 those comments into the CLRP or explain in writing why those comments were not
3 accepted. Disputes as to the acceptance of Baykeeper's comments on the CLRP are to
4 be resolved via Dispute Resolution as set out in Section XII below.

5 52. Upon completion of the final CLRP, San José must perform assessments
6 of their best management practices every two (2) Years. Reported outcomes must be
7 expressly compared to the FIB Reduction Standard of this Consent Decree.

8 Performance assessment reporting must include:

- 9 a. The status of completion of proposed structural treatment control
10 BMPs;
11 b. The status of implementation of nonstructural BMPs;
12 c. Information related to the validity of the RAA performed in support of
13 the CLRP and any underlying assumptions and risks; and
14 d. The results of any monitoring undertaken to evaluate the impact of
15 implementation of the CLRP on receiving water quality.

16 **C. Implementation Schedule**

17 53. Subject to, and contingent upon, the City receiving sufficient new revenue
18 sources as set forth in Section D, Paragraphs 54-56 below, implementation of milestones
19 and compliance with the FIB Load Reduction Standard and implementation of the CLRP
20 shall be completed on the following schedule:

- 21 a. San José shall contract with a qualified consultant to develop the
22 CLRP and RAA by June 30, 2017.
23 b. The framework for the CLRP that meets the requirements of Section
24 C.3.j.i(1) of the MS4 Permit will be completed by June 30, 2017.
25 c. A draft CLRP shall be submitted to Baykeeper by February 28,
26 2020.
27 d. A final CLRP shall be submitted to Baykeeper by July 31, 2020.
28 e. The Parties shall meet and confer to discuss the CLRP and identify

1 the highest priority projects identified in the final CLRP for implementation during the life
2 of this Consent Decree by November 20, 2020. If unforeseen delays occur in meeting
3 the implementation schedule, including but not limited to permitting or a legal challenge,
4 despite all good faith efforts of San José, the Parties shall meet and confer regarding
5 the implementation schedule.

6 f. San José shall appropriate a total of at least one hundred million
7 dollars (\$100,000,000) over a 10-year period to implement the CLRP, including but not
8 limited to the acquisition of land, environmental review, design, construction, operation,
9 and maintenance of projects identified in the final CLRP.

10 g. San José shall procure consultant services on or before September
11 1, 2021, for the purposes of implementing projects identified in the final CLRP totaling at
12 least one hundred million dollars (\$100,000,000) over a 10-year period.

13 h. On or before September 1, 2024, San José shall complete the
14 design, environmental, and geotechnical analysis of projects identified in the final CLRP
15 representing at least twenty-five million dollars (\$25,000,000) in total project costs.

16 i. On or before September 1, 2025, San José shall award contracts for
17 projects identified in the CLRP totaling at least twenty-five million dollars (\$25,000,000).

18 j. On or before September 1, 2025, San José shall complete the
19 design, environmental, and geotechnical analysis of projects identified in the final CLRP
20 representing at least thirty-five million dollars (\$35,000,000), inclusive of sub-paragraph
21 h above, in total project costs.

22 k. On or before the Termination Date, San José shall award contracts
23 for projects identified in the CLRP totaling at least thirty-five million dollars
24 (\$35,000,000), inclusive of sub-paragraph i above, in total project costs.

25 l. On or before the Termination Date, San José shall complete the
26 design, environmental, and geotechnical analysis of projects identified in the final CLRP
27 representing at least fifty million dollars (\$50,000,000), inclusive of sub-paragraphs h
28 and j above, in total project costs.

1 m. At least ninety (90) days prior to the Termination Date, San José
2 shall provide to Baykeeper a final implementation letter. The final implementation letter
3 shall provide sufficient information and detail to demonstrate that San José has
4 undertaken and will have completed sufficient activities to fully comply with the
5 implementation schedule in this Paragraph by the Termination Date. The final
6 implementation letter shall be subject to review, comment, and the Dispute Resolution
7 provisions in Section XII below.

8 **D. Funding**

9 54. The Parties recognize that the City will need additional revenue sources to
10 implement the projects included in the CLRP. City staff will identify potential funding
11 sources, including state and federal sources, and make all best efforts to submit timely
12 and complete applications for the following grants, at a minimum and as available:

- 13 a. Prop 84 Grants
- 14 b. Proposition 1 Planning Grants
- 15 c. Proposition 1 Implementation Grants

16 55. The City shall bring additional possible revenue measures intended to seek
17 funding to implement the CLRP, to the City Council for consideration by December 31,
18 2017. Nothing in this paragraph obligates the City Council to take a particular legislative
19 action. Revenue measures may include:

- 20 a. Stormwater sewer fee
- 21 b. Stormwater sewer tax
- 22 c. Bond

23 56. If San José is unable to obtain funding by December 31, 2020 sufficient to
24 implement the CLRP and meet the FIB Load Reduction Standard, the Parties shall meet
25 and confer to discuss what measures San José will take to ensure funding is acquired. If
26 San José has not obtained funding sufficient to implement the CLRP by December 31,
27 2020, Baykeeper may, in its discretion, terminate this Consent Decree. If Baykeeper
28

1 chooses not to terminate this Consent Decree, the Parties will work together to identify
2 other sources of funding available for San José to implement the CLRP and meet the
3 FIB Load Reduction Standard.

4 57. In any public communications related to fee or tax increase(s) related to this
5 Consent Decree, San José will not negatively cite Baykeeper or this Consent Decree as
6 the reason for such fee or tax increase(s), and will allow Baykeeper, to the extent
7 practicable, to review any media or marketing materials in advance of their release to the
8 public.

9 VIII. COLLECTION SYSTEM IMPROVEMENT PROGRAM

10 A. Exfiltration Abatement Program

11 58. San José shall develop and implement an Exfiltration Abatement Program.
12 The goal of this program is to identify and prioritize for pipe rehabilitation, replacement or
13 repair the Gravity Sewer lines that have a high risk of leaking wastewater from the San
14 José Collection System to the San José MS4.

15 59. As part of this Program, San José shall identify Sewer Line Segments
16 meeting all of the following criteria: (1) Sewer Line Segments that are constructed of
17 vitrified clay or reinforced concrete; (2) Sewer Line Segments that cross above MS4
18 pipes or are above and within ten (10) feet horizontally of MS4 pipes; (3) Sewer Line
19 Segments fifty Years or older, with a condition assessment that identifies that the Sewer
20 Line Segment has a medium to severe crack, offset joint, or some other structural defect
21 of Grade 4 or higher according to PACP standards; and (4) Sewer Line Segments that
22 are above the water table ("High Risk Pipes"). All Sewer Line Segments in the San José
23 Collection System for which San José already possesses necessary information to
24 evaluate using criteria (1)-(4) of this Paragraph shall be evaluated and designated as
25 High Risk Pipes, as appropriate, by December 31, 2016. All other Sewer Line Segments
26 in the San José Collection System meeting requirements (1), (2) and (4) of this
27 Paragraph shall be inspected using CCTV, ranked according to PACP standards, and
28

1 designated High Risk Pipes, as appropriate, by December 31, 2019.

2 60. San José shall repair, rehabilitate, or replace all discovered High Risk
3 Pipes totaling on average at least six and a half (6.5) miles of High Risk Pipes each Year
4 (equal to at least sixty-five (65) miles over the term of the Consent Decree).

5 61. If San José completes repair, rehabilitation and replacement of all the High
6 Risk Pipes and that total is less than sixty-five (65) miles, San José shall continue to
7 repair, rehabilitate, or replace Sewer Line Segments totaling on average at least six and
8 a half (6.5) miles per Year (at least sixty-five (65) miles over the term of the Consent
9 Decree) based on the following criteria: (1) Sewer Line Segments that cross above MS4
10 pipes or are above and within ten (10) feet horizontally of MS4 pipes; and (2) a condition
11 assessment identifies that the Sewer Line Segment has a medium to severe crack, offset
12 joint, or some other structural defect of Grade 4 or higher according to PACP standards.

13 62. By December 31, 2016, and thereafter by October 30 of each Year this
14 Consent Decree remains in effect, San José shall submit an Annual Exfiltration
15 Abatement Program Plan to Baykeeper. The Annual Exfiltration Abatement Program
16 Plan shall be designed to eliminate the threat to water quality from High Risk Pipes and
17 shall:

18 a. Describe the Exfiltration Abatement Program activities for the
19 preceding fiscal year;

20 b. Identify all San José MS4 pipes and Sewer Line Segments San
21 José considered to determine which Sewer Line Segments are High Risk Pipes; which
22 High Risk Pipes San José considered for repair, rehabilitation, and replacement; and
23 which of those San José intends to repair, rehabilitate, or replace during that fiscal year;

24 c. Include an ESRI GIS Shapefile for the pipes identified in sub-
25 paragraph b above that contains the pipe ID number, upstream manhole identifier,
26 downstream manhole identifier, upstream and downstream invert elevations, pipe age
27 (for Sewer Line Segments only), pipe material (for Sewer Line Segments only), pipe
28 diameter, and whether the specific Sewer Line Segment was selected for repair,

1 rehabilitation, or replacement; and

2 d. Describe how the factors listed in Paragraph 59 were used to
3 prioritize the Sewer Line Segments selected for repair, rehabilitation, or replacement.

4 63. Baykeeper will review the Annual Exfiltration Abatement Program Plan and
5 submit comments, if any, on the Annual Exfiltration Abatement Program Plan within thirty
6 (30) days of receipt. San José shall consider Baykeeper comments in good faith, and
7 shall have fifteen (15) days from receipt of Baykeeper's comments to either incorporate
8 those comments into the Annual Exfiltration Abatement Program Plan or explain in
9 writing why those comments were not accepted. Disputes as to the adequacy of the
10 Annual Exfiltration Abatement Program Plan shall be resolved via the Dispute Resolution
11 provisions in Section XII below.

12 **B. CAPACITY ASSURANCE**

13 64. On or before December 21, 2017, San José shall review San José's 2013
14 Trunk System Master Plan, the capacity assessment associated with that Master Plan,
15 and any other appropriate documents, to generate a Capacity Assurance Program for
16 the trunk system. The Capacity Assurance Program shall evaluate whether San José
17 has adequate capacity to prevent capacity related SSOs from the trunk system during
18 rain events up to and including a 10-Year 24-Hour Storm, recommend capacity
19 improvement, where appropriate, and prioritize and plan identified capacity projects
20 sufficient to ensure adequate capacity to prevent spills up to the 10-Year 24-Hour Storm.

21 **C. ANNUAL COLLECTION SYSTEM REPORT**

22 65. Beginning in 2017, San José shall submit an Annual Collection System
23 Report to Baykeeper, along with its Annual Report. The Annual Collection System
24 Report shall provide details relevant to San José's implementation of, and compliance
25 with, this Section VIII during the preceding Year, including:

26 a. Any program modifications or delays during the preceding Year;

27 b. CCTV inspection schedules in the upcoming Year for inspection of
28

1 Gravity Sewers.

2 c. A statement of:

3 i. The miles of Sewer Line Segments that were assessed in the
4 preceding Year;

5 ii. The miles of Sewer Line Segments assessed receiving each
6 grade in the PACP grading system;

7 iii. A summary of the mileage and identification of Sewer Line
8 Segments repaired, rehabilitated, and/or replaced during the preceding Year; and

9 iv. A map of the Sewer Line Segments cleaned.

10 66. Baykeeper will submit comments, if any, on the Annual Collection System
11 Report within thirty (30) days of receipt. Unless provided otherwise, San José shall
12 consider Baykeeper's comments in good faith and shall have twenty (20) days from
13 receipt of Baykeeper's comments to either incorporate those comments into the Annual
14 Collection System Report or explain in writing why those comments were not accepted.
15 Disputes as to the adequacy of the Annual Collection System Report shall be resolved
16 via Dispute Resolution as set out in Section XII of the Consent Decree.

17 **IX. ENVIRONMENTAL MITIGATION PROJECT, LITIGATION COSTS, AND**
18 **COMPLIANCE MONITORING**

19 67. Environmental Mitigation Project: In lieu of civil penalties and to mitigate
20 past environmental harms allegedly resulting from the allegations in the Complaint, San
21 José agrees to fund and implement one or more environmental mitigation project(s) for
22 the five (5) Years following enactment of this Consent Decree in the amount of two
23 hundred thousand dollars (\$200,000) per Year to be paid to San Jose Parks Foundation,
24 to give grants for projects that mitigate the impacts of municipal stormwater pollution
25 and/or trash on Coyote Creek and the Guadalupe River. Within forty-five (45) days of
26 the Effective Date and July 1 of each Year thereafter for the first five (5) Years of the
27 term of the Consent Decree, San José will submit payment of two hundred thousand
28 dollars (\$200,000) to "San Jose Parks Foundation" addressed to: P.O. Box 53841, San

1 Jose, California 95153.

2 a. Projects must be based on the following criteria:

3 i. Projects that mitigate the impacts of trash and bacteria
4 discharges in Coyote Creek or the Guadalupe River;

5 ii. Projects that otherwise improve water quality in Coyote Creek
6 or the Guadalupe River; or

7 iii. Projects that include habitat restoration on Coyote Creek or
8 the Guadalupe River.

9 b. Where projects meeting any of the criteria set out in sub-paragraph
10 67a with a cumulative total of one million dollars (\$1,000,000) are not identified by the
11 San Jose Parks Foundation within six (6) years after the Effective Date, the San Jose
12 Parks Foundation may provide funding for projects to mitigate the impacts of urban
13 stormwater in the Guadalupe River or Coyote Creek watersheds.

14 c. Within thirty (30) days of execution of this Consent Decree, the San
15 Jose Parks Foundation will provide a letter to the United States Department of Justice
16 and the Parties confirming its commitment to grant the environmental mitigation funds
17 consistent with the requirements of the Consent Decree. The San Jose Parks
18 Foundation will also provide a letter to U.S. Department of Justice and the Parties
19 summarizing each Year's grants, again confirming consistency with Consent Decree
20 requirements, on or before January 30th each Year during the term of the Consent
21 Decree.

22 d. Past or present City representatives or employees must recuse
23 themselves from any part of the grant allocation process for the projects described in
24 this Paragraph. The environmental mitigation funds granted pursuant to this Paragraph
25 shall not replace funding from the City for any current or planned projects.

26 68. Baykeeper's Litigation Fees and Costs. San José agrees to pay
27 Baykeeper the sum of four hundred twenty-five thousand dollars (\$425,000), which
28

1 covers attorneys' fees and costs for services performed by and on behalf of Baykeeper
2 by its attorneys and consultants. San José will submit payment within forty-five (45)
3 days of the Effective Date to "San Francisco Baykeeper" addressed to: 1736 Franklin
4 Street, Suite 800, Oakland, California 94612.

5 69. Compliance Monitoring. To defray Baykeeper's time and costs monitoring
6 San José's compliance with this Consent Decree over the next ten (10) Years, San José
7 agrees to pay Baykeeper the sum of ten thousand dollars (\$10,000) per Year for the
8 term of this Consent Decree. Payment shall be made by June 30 of each Year
9 commencing June 30, 2017, and shall be made payable to "San Francisco Baykeeper"
10 addressed to: 1736 Franklin Street, Suite 800, Oakland, California 94612. In the final
11 Year of this Consent Decree, San José shall remit the final compliance monitoring
12 payment of ten thousand dollars (\$10,000) to Baykeeper by the Termination Date. If this
13 Consent Decree terminates early pursuant to Paragraph 56, San José shall remit the
14 final compliance monitoring payment prorated for the time the Consent Decree was in
15 effect during the fiscal year to Baykeeper within forty-five (45) days of the Termination
16 Date.

17 X. STIPULATED PENALTIES

18 70. San José agrees to pay the following stipulated payments in the event that
19 it misses a deadline required by this Consent Decree, other than a missed deadline
20 because of a Force Majeure event as defined in Paragraph 101:

21 a. For any report more than ten (10) days late, San José shall pay fifty
22 dollars (\$50) per day, up to thirty (30) days late for a total of one thousand dollars
23 (\$1,000.00).

24 b. For any report more than thirty (30) days late, San José shall pay an
25 additional one thousand dollars (\$1,000).

26 c. For any report more than ninety (90) days late, San José shall pay
27 an additional three thousand dollars (\$3,000).

1 d. The above penalties are cumulative, as applicable, to a maximum
2 penalty of seven thousand dollars (\$7,000) per report.

3 71. Any disagreement as to the amount of a stipulated payment is subject to
4 the Dispute Resolution provisions in Section XII below. San José agrees to pay any
5 stipulated payments due pursuant to this Consent Decree within forty-five (45) days after
6 the City receives written notice of the stipulated payment liability, or within forty-five (45)
7 days after resolution of a dispute in favor of Baykeeper if Dispute Resolution has been
8 invoked.

9 72. All payments of stipulated penalties described above must be paid by San
10 José to Baykeeper at the address in Paragraph 91.

11 73. The payment of stipulated penalties under this Consent Decree will not be
12 deemed an admission of or a violation of any law, regulation, or any of San José's
13 NPDES Permits.

14 **XI. REGULATORY AGENCY ACTION**

15 74. In entering into this Consent Decree, the Parties intend that San José
16 comply with the MS4 Permit requirements. The Parties further recognize that the
17 Regional Water Board has the primary obligation to issue and oversee compliance with
18 the MS4 Permit. The Parties intend that the Consent Decree be consistent with
19 regulatory requirements. In the event that the State Water Resources Control Board
20 ("State Water Board"), Regional Water Board, or staff thereof issues written
21 requirements, guidance, or directives that are inconsistent with the requirements of the
22 Consent Decree, the Parties shall meet and confer pursuant to the Dispute Resolution
23 provisions in Section XII below. In the event the Regional Water Board or the State
24 Water Board modifies the MS4 Permit, or modifies applicable Water Quality Objectives
25 or Total Maximum Daily Loads ("TMDLs") and incorporates those into the Basin Plan, the
26 Parties shall meet and confer pursuant to the Dispute Resolution provisions and
27 negotiate in good faith to modify the terms of this Consent Decree to be consistent with
28

1 the modified requirements. Nothing in this Consent Decree prohibits either Party from
2 challenging the Regional Water Board's or State Water Board's actions or inactions.

3 XII. DISPUTE RESOLUTION

4 75. This Court will retain jurisdiction over this matter for the term of this
5 Consent Decree for the purposes of enforcing the terms and conditions of this Consent
6 Decree, and adjudicating any disputes between the Parties that may arise under the
7 provisions of this Consent Decree. The Court has and will maintain the power to enforce
8 this Consent Decree with all available legal and equitable remedies.

9 76. In resolving disputes concerning implementation or interpretation of any
10 provision of this Consent Decree, the Parties agree that any action or proceeding to
11 enforce or interpret the terms of this Consent Decree or how regulatory mandates impact
12 this Consent Decree, cannot be heard by the Court unless the Parties have first utilized
13 Informal Dispute Resolution in Paragraph 78, and the mediation process in Paragraph
14 79.

15 77. Either Party to this Consent Decree may invoke the dispute resolution
16 procedures of this Section by notifying the other Party in writing and clearly stating the
17 matter(s) in dispute and of the Party's proposal to resolve the dispute under this Section.

18 78. The Parties will meet and confer (either by telephone or in person) in a
19 good faith attempt to resolve the dispute informally ("Informal Dispute Resolution") within
20 thirty (30) days from the date of the notice. By mutual consent, the Parties may extend
21 the time to meet and confer.

22 79. If Informal Dispute Resolution is not successful in resolving the dispute,
23 either Party may request mediation in the Federal District Court with Magistrate Judge
24 Cousins serving as the mediator, or if unavailable, another Federal Magistrate assigned
25 to this matter.

26 80. The Party initiating the mediation must serve a written notice of its
27 intention to seek mediation ("Mediation Notice"). The Mediation Notice may be no longer
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1 than 15 pages in length and must set forth with particularity all of the Party's claims and
2 the factual foundation for such claims. Within fourteen (14) days of receipt of the
3 Mediation Notice, the other Party must serve a written response of no more than fifteen
4 (15) pages setting forth with particularity its position with regard to the claims contained
5 in the Mediation Notice ("Response"). The Mediation Notice and the Response will be
6 provided concurrently to Magistrate Judge Cousins or another Magistrate as appropriate.
7 The Parties and the Magistrate may hold a pre-mediation conference for the purpose of
8 setting the schedule and procedures for the mediation. Each Party shall pay its own fees
9 and costs for the mediation.

10 81. If the Parties cannot resolve a dispute through Informal Dispute Resolution
11 or the mediation process, then either Party may invoke formal dispute resolution
12 ("Formal Dispute Resolution"). To invoke Formal Dispute Resolution, a Party must file a
13 motion before the District Court to interpret this Consent Decree; reconcile provisions of
14 this Consent Decree with regulatory changes, guidance or directives; or determine
15 whether either Party is in breach of this Consent Decree and if so, to require the
16 breaching Party to correct the breach identified by the Court within a reasonable period
17 of time. The filing Party may request an expedited hearing schedule on the motion.

18 82. When resolving disputes, in addition to contract interpretation principles
19 and Clean Water Act precedent, the Parties and the District Court Judge shall consider:

- 20 a. Changes in any re-issued Permit;
- 21 b. Written guidance or permit interpretation from Regional Water Board
22 staff;
- 23 c. The Bay Area Stormwater Management Agencies Association or
24 SCVURPPP regional program, such as the Trash Receiving Water Monitoring Plan,
25 once completed and approved by the Regional Water Board; and
- 26 d. Changes to Water Quality Objectives in the San Francisco Bay
27 Basin Water Quality Control Plan, including the establishment of a TMDL.

1 83. To help limit fees and costs potentially incurred in dispute resolution, the
2 Parties agree to waive the right to appeal any decision of the District Court.

3 84. Except as otherwise provided in this Consent Decree, litigation costs and
4 fees incurred in addressing and/or resolving any dispute shall be awarded in accordance
5 with the standard established by section 505 of the Clean Water Act, 33 U.S.C. § 1365,
6 and case law interpreting that standard, provided that San José will not be obligated to
7 pay more than two hundred thousand dollars (\$200,000) during the term of this Consent
8 Decree.

9 85. Notwithstanding that a particular issue is in the Dispute Resolution process
10 outlined in this Section XII, San José must comply with any provisions of the Consent
11 Decree that are not in dispute. The timeline for implementation of any issues that are in
12 the Dispute Resolution process will be tolled pending the outcome of the Dispute
13 Resolution.

14 XIII. MUTUAL RELEASE OF LIABILITY

15 86. Baykeeper's Release. Upon the Effective Date of this Consent Decree and
16 through the Termination Date, Baykeeper, on its own behalf and on behalf of its current
17 and former officers, directors, employees, and each of their successors and assigns, and
18 its agents, attorneys, and other representatives, hereby releases and covenants not to
19 sue San José (and each of its current, former, and future City Council members, officers,
20 directors and employees, and each of their predecessors, successors and assigns, and
21 each of their agents, attorneys, consultants, and other representatives) of and from, and
22 waives CWA claims, known and unknown, that Baykeeper alleged, or could have alleged
23 in its Notice Letter or Complaint and for alleged violations of the MS4 Permit occurring
24 during the term of this Consent Decree, including all claims for injunctive relief, penalties,
25 fees (including fees of attorneys, experts, and others), costs, expenses or any other sum
26 incurred or claimed. Baykeeper's release does not apply to claims for San José's failure
27 to comply with this Consent Decree.

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1 87. San José's Release. Upon the Effective Date of this Consent Decree, San
2 José, on its own behalf and on behalf of its current and former City Council members
3 and employees, and each of their successors and assigns, and their agents, attorneys,
4 and other representatives, hereby releases Baykeeper (and its current and former
5 officers, directors, and employees, and each of their successors and assigns, and its
6 agents, attorneys, and other representatives) of and from, and waives all claims which
7 arise from or pertain to this action, including all claims for fees (including fees of
8 attorneys, experts, and others), costs, expenses or any other sum incurred or claimed for
9 matters related to, or which could have been asserted in response to, Baykeeper's
10 Complaint up to the Termination Date. San Jose's release does not apply to claims for
11 Baykeeper's failure to comply with this Consent Decree.

12 88. California Civil Code Waiver. The Parties acknowledge that they are
13 familiar with section 1542 of the California Civil Code, which provides:

14 A general release does not extend to claims which the creditor does not
15 know or suspect to exist in his favor at the time of the executing the
16 release, which if known by him must have materially affected his
17 settlement with the debtor.

18 The Parties hereby waive and relinquish any rights or benefits they may have under
19 California Civil Code section 1542 with respect to any other claims against each other
20 arising from, or related to, the allegations and claims as set forth in the Notice Letter, the
21 Complaint, or the MS4 Permit during the term of this Consent Decree.

22 89. Nothing in this Consent Decree limits or otherwise affects the Parties' right
23 to address or take any position that they deem necessary or appropriate in any formal or
24 informal proceeding before the Regional Water Board, the State Water Board, the U.S.
25 Environmental Protection Agency, or any other judicial or administrative body on any
26 matter relating to the MS4 Permit or any reissued or subsequent version of the MS4
27 Permit, or any issue relevant to this action. Unless otherwise expressly waived in this
28 Consent Decree, the City further reserves all defenses, whether legal or equitable, with
respect to any future enforcement action that may be brought against it, whether by

1 Plaintiff, the United States, the State of California or any other person or entity. San
2 José further expressly reserves all rights and remedies otherwise available to it with
3 respect to the MS4 Permit.

4 90. During the term of this Consent Decree, Baykeeper, and its employees
5 acting on behalf of Baykeeper, will not provide data, financial support or personnel time
6 for the purpose of supporting lawsuits brought by other groups or individuals against the
7 City for the violations alleged in the Notice Letter or Complaint or for any alleged
8 violations of the MS4 Permit.

9 **XIV. NOTICES AND SUBMISSIONS**

10 91. Any notifications, submissions, or communications to Baykeeper or to San
11 José pursuant to this Consent Decree will be, to the extent feasible, sent via electronic
12 mail transmission to the e-mail addresses listed below (electronic return receipt
13 requested) or, if electronic transmission is not feasible, via U.S. Mail or hand delivery to
14 the following addresses. Any change in the individuals or addresses designated by any
15 Party must be made in writing to all Parties, but the Parties stipulate and agree that the
16 Parties need not amend this Consent Decree to effectuate a change in the notice
17 recipients.

18 If to Baykeeper:

19 Daniel Cooper
20 Lawyers for Clean Water, Inc
21 1004-A O'Reilly Avenue
22 San Francisco, California 94129
Email: daniel@lawyersforcleanwater.com

23 With copies to:

24 Nicole Sasaki
25 San Francisco Baykeeper
1736 Franklin Street, Suite 800
Oakland, California 94612
26 Email: nicole@baykeeper.org
27
28

1 If to San José:

2 City of San José
3 Attn: City Attorney
4 200 E. Santa Clara St., 16th Floor
5 San José, CA 95113
6 Telephone: (408) 535-1900
7 Facsimile: (408) 998-3131
8 Email: nora.frimann@sanjoseca.gov

9 With copies to:

10 City of San José
11 Attn: Directors of Environmental Services,
12 Public Works and Transportation
13 200 East Santa Clara Street
14 San José, CA 95113
15 Telephone: (408) 535-1900
16 Facsimile: (408) 998-3131
17 Email: cao.main@sanjoseca.gov

18 92. Notices submitted electronically in accordance with this Section will be
19 deemed submitted upon transmission, but a notice is not effective if the sending Party
20 learns that it did not reach the Party to be notified. Notwithstanding the sender's receipt
21 of a successful delivery notification, a recipient that fails to receive the submission may
22 request delivery by other means. Such a request does not affect the timeliness of the
23 original submission. Notices sent by U.S. Mail will be deemed submitted on the date
24 they are postmarked.

25 93. San José agrees to provide to Baykeeper any new or existing final
26 technical reports or documents within San José's custody or control that are reasonably
27 necessary to confirm San José's compliance with this Consent Decree within thirty (30)
28 days of written request by Baykeeper.

29 94. During the term of this Consent Decree, San José agrees to provide
30 Baykeeper with a copy of all final documents required to be submitted to the Regional
31 Water Board or the State Water Board concerning the City's compliance with the current
32 or any subsequent MS4 Permit. Such documents will be transmitted to Baykeeper via

1 electronic mail at the time, or within twenty-four (24) hours, that the documents are
2 submitted to the Regional Water Board or State Water Board, with the exception of the
3 Annual Report. The Parties agree that San José is under no obligation to provide
4 Baykeeper any documents, data or reports that are not in final form.

5 95. During the term of this Consent Decree, San José will use its best efforts to
6 provide Baykeeper with a copy of all public communications and education materials
7 related to the matters covered under this Consent Decree, including but not limited to
8 trash reduction marketing campaigns.

9 96. Failure to provide copies to Baykeeper of reports to the Regional Water
10 Board or the State Water Board or public communications as required in Paragraphs 94-
11 95 will not subject the City to stipulated penalties under Section X of this Consent
12 Decree.

13 97. During the life of this Consent Decree, San José will preserve at least one
14 legible copy of all records and documents, including computer-stored information, which
15 memorializes performance of its obligations under this Consent Decree.

16 **XV. GENERAL PROVISIONS**

17 98. Construction. The language in all parts of this Consent Decree will be
18 construed according to its plain and ordinary meaning, except as to those terms
19 specifically defined within the Consent Decree or the MS4 Permit. If a term is defined
20 differently in this Consent Decree and the MS4 Permit, the definition in the Consent
21 Decree shall control.

22 99. Choice of Law. The laws of the United States will govern this Consent
23 Decree, and to the extent State law applies, the laws of the State of California will
24 govern.

25 100. Counterparts. This Consent Decree may be executed in any number of
26 counterparts, all of which together will constitute one original document. Telecopy,
27 scanned copies (i.e., pdf) and/or facsimile copies of original signature will be deemed to
28

1 be originally executed counterparts of this Consent Decree.

2 101. Force Majeure. Neither Party will be considered to be in default in the
3 performance of any obligations under this Consent Decree precluded by an event of
4 Force Majeure. Force Majeure is any act of God, war, fire, earthquake, natural
5 catastrophe, sabotage or terrorism, city-wide civil unrest, or restraint by court order.
6 Force Majeure does not include normal inclement weather, economic hardship, or failure
7 to allocate funds to comply with this Consent Decree during San José's annual budget
8 process, except where these conditions are due to a Force Majeure event. Any Party
9 seeking to rely upon this Section to excuse or postpone performance shall have the
10 burden of establishing that it could not reasonably have avoided the Force Majeure event
11 and that through the exercise of due diligence it has been unable to overcome the failure
12 of performance. The Parties shall exercise due diligence to resolve and remove any
13 Force Majeure event. For any delay in performance caused by a Force Majeure event,
14 the Parties agree to modify this Consent Decree to provide additional time for
15 performance of the particular requirement and, as applicable, any subsequent
16 requirement affected by the Force Majeure. Delay in compliance with a particular
17 requirement due to a Force Majeure event shall not excuse or delay compliance with any
18 and all other unrelated and unaffected obligations required under this Consent Decree.
19 If the Parties are unable to agree that a delay has been caused by a Force Majeure
20 event, or if the Parties are unable to agree on a modification to the schedule for the
21 particular requirement(s) delayed due to Force Majeure, the Parties will invoke Dispute
22 Resolution provisions in Section XII.

23 102. Modification of the Consent Decree. This Consent Decree, and any
24 provisions herein, may not be changed, waived, discharged, or terminated unless by a
25 written instrument, signed by the Parties. The Parties agree to modify the Consent
26 Decree to incorporate any changes to the Consent Decree as a result of the Dispute
27 Resolution process, if any.

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1 103. Full Settlement. This Consent Decree constitutes a full and final
2 satisfaction of this matter, including without limitation, anything in Plaintiff's Notice Letter
3 or Complaint.

4 104. Severability. Except as otherwise expressly provided in this Consent
5 Decree, in the event that any provision, paragraph, Section, subsection, or sentence of
6 this Consent Decree is held by the Court to be unenforceable, the validity of the
7 enforceable provisions will remain in full force and effect providing that the intent of the
8 Parties when entering into this Consent Decree can still be achieved.

9 105. Integration Clause. This is an integrated Consent Decree. This Consent
10 Decree is intended to be a full and complete statement of the terms of the agreement
11 between the Parties and expressly supersedes any and all prior oral or written
12 agreements, covenants, representations, and warranties (express or implied) concerning
13 the subject matter of this Consent Decree.

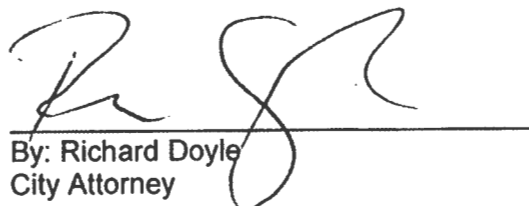
14 106. No Third Party Beneficiaries. This Consent Decree does not confer upon
15 any person other than the Parties any rights or remedies hereunder.

16 107. Authority. The undersigned representatives for Baykeeper and San José
17 each certify that he/she is fully authorized by the Party whom he/she represents to enter
18 into the terms and conditions of this Consent Decree, to execute it on behalf of the
19 Parties, and to legally bind the Parties to its terms.

20 The Parties hereby enter into this Consent Decree.

21 CITY OF SAN JOSÉ

22 Date: 6/16/14

23 
24 By: Richard Doyle
25 City Attorney

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APPROVED AS TO FORM:

Date: 6.15.16


By: Nora Frimann
Assistant City Attorney


SAN FRANCISCO BAYKEEPER:

Date: June 1, 2016


By: Sejal Choksi-Chugh
Executive Director

APPROVED AS TO FORM:

Date: 27 May 2016


By: Daniel Cooper
Lawyers for Clean Water, Inc.
Counsel for Baykeeper

IT IS SO ORDERED

Date: _____

Honorable Beth Labson Freeman
District Judge of the
United States District Court for the
Northern District of California